**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION AT DAYTON**

ANTHONY WILLIAMS,

Petitioner, : Case No. 3:06-cv-284

: District Judge Thomas M. Rose
-vs- Chief Magistrate Judge Michael R. Merz

XENIA MUNICIPAL COURT,

: Respondent.

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**ORDER TO SUPPLEMENT PETITION**

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This case is before the Court for initial review pursuant to Rule 4 of the Rules Governing § 2254 Cases.[1] Petitioner Anthony Williams is serving a sentence of 210 days upon his conviction for assault and domestic violence in Case No. 2006 CRB 00710 in the Xenia Municipal Court and claims that that conviction is unconstitutional for various reasons.

United States District Courts have jurisdiction in habeas corpus to consider claims that state court convictions are unconstitutional. However, before coming to federal court, a state prisoner must exhaust remedies available under state law to correct the error. 28 U.S.C. §2254(b) and (c); *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). In Ohio, this includes direct and delayed appeal to the Ohio Court of Appeals and the Ohio Supreme Court. *Mackey v.*

[1]Petitioner filed this case on the form prescribed for Motions to Vacate under 28 U.S.C. §2255. Relief under that statute is available only to prisoners who are in custody on federal criminal convictions and it is clear from the Motion that Petitioner is committed for violations of state law. The Court therefore construes the case as one for habeas corpus relief under 28 U.S.C. §2254.

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*Koloski*, 413 F.2d 1019 (6th Cir. 1969); *Allen v. Perini,* 424 F.2d 134, 140 (6th Cir. 1970). It also includes the remedy of a petition for post-conviction relief under Ohio Revised Code §2953.21. *Manning v. Alexander*, 912 F.2d 878 (6th Cir. 1990). A habeas petition in federal district court containing claims which have not yet been exhausted must be dismissed. *Rose v. Lundy*, 455 U.S. 509 (1982); *Pilette v. Foltz,* 824 F.2d 494 (6th Cir. 1987).

While the exhaustion doctrine is not jurisdictional and is thus waivable by the State, *Ex parte Royall*, 117 U.S. 241, 65 S. Ct. 742, 29 L. Ed. 2d 872 (1886); *Granberry v. Greer*, 481 U.S. 129, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987), 28 U.S.C. §2254(b)(3) as added by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214), provides "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." In the absence of exceptional or unusual circumstances, principles of comity and federalism require that unexhausted claims be decided in the first instance by the state courts even if the State does not raise the defense. *O'Guinn v. Dutton*, 88 F.3d 1409 (6th Cir. 1996)(per curiam)(en banc).

In his Motion, Petitioner lists three state remedies which he is attempting to exhaust: direct appeal to the Ohio Second District Court of Appeals, state habeas corpus in the Greene County Common Pleas Court, and state habeas corpus in Ohio Supreme Court. He has not pled any reason why those remedies are somehow futile. He notes that there are only 210 days on his sentence and thus it might expire before those courts could reach the merits of his claims, but he has not said that he has attempted to obtain release on bond by those courts pending their reaching the merits of his claims. He also could potentially obtain a stay of execution from the Xenia Municipal Court pending decision of the appeal on the merits.

It is accordingly ORDERED that Petitioner supplement his Motion promptly to indicate what he has done to exhaust the state court remedies and/or why this Court should proceed without requiring exhaustion.

September 14, 2006.

s/ Michael R. Merz
Chief United States Magistrate Judge